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Nos. 13-354 & 13-356

In The Supreme Court of the United States

KATHLEEN SEBELIUS, *ET AL.*, *Petitioners*,
v.
HOBBY LOBBY STORES, INC., *ET AL.*, *Respondents*.

CONESTOGA WOOD SPECIALTIES CORP., *ET AL.*, *Petitioners*,
v.
KATHLEEN SEBELIUS, *ET AL.*, *Respondents*.

On Writs of Certiorari to the United States Courts of Appeals for the Third and Tenth Circuits

BRIEF OF THE FAMILY RESEARCH COUNCIL AS *AMICUS CURIAE* IN SUPPORT OF HOBBY LOBBY AND CONESTOGA, *ET AL.*

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TABLE OF CONTENTS

Table of Contents i

Table of Authorities ii

Interest of *Amicus Curiae* 1

Summary of Argument 1

Argument 4

I. Commercial Activity Does Not Preclude or Excuse Religious Observance and Often Can Be a Means of Exercising Religion. 6

II. The Corporate Parties in this Case Themselves Exercised Religion and thus Are Entitled To Invoke RFRA. 18

Conclusion 23

TABLE OF AUTHORITIES

Statutes

42 U.S.C. § 2000e 21

42 U.S.C. § 2000e-5 21

42 U.S.C. 2000bb, *et seq.* 4

DEL. GEN. CORP. L. § 101 20

DEL. GEN. CORP. L. § 102 21

DEL. GEN. CORP. L. § 141 22

Other Authorities

Business Halacha, *Hilchos Chosen Mispat Vol. III, No. 19: Fair Profits and Measures*, available at http://www.torah.org/advanced/business-halacha/5757/vol3no18.html (visited Jan. 26, 2014) 13

CATECHISM OF THE CATHOLIC CHURCH, available at http://www.vatican.va/archive/ENG0015/__P8D.HTM (visited Jan. 26, 2014) 11

Catholic News Agency, *Live your faith in the marketplace, cardinal tells business leaders* (Apr. 9, 2012), available at http://www.catholicnewsagency.com/news/live-your-faith-in-the-marketplace-cardinal-tells-business-leaders/ (visited Jan. 26, 2014) 12

CONVERSATIONS WITH JOSEMAIRA ESCRIVA (Scepter Publishers 2003) 10, 11

Josemaria Escriva, FURROW (Scepter Publishers 1988) 11

Rabbi David Golinkin, *The Basic Principles of Jewish Business Ethics*, Vol. 3, No. 1 (October 2003), available at http://www.schechter.edu/insightIsrael.aspx?ID=59 (visited Jan. 26, 2014) 13, 14

Rabbi Yitzchok Breitowitz, *Jewish Business Ethics: An Introductory Perpective* (Part I), available at http://www.jlaw.com/Articles/JewBusEthI.html (visited Jan. 26, 2014) 14

Stephen A. Hein, *Luther on* Vocatio: *Ordinary Life for Ordinary Saints*, Issues, Etc., available at http://www.mtio.com/articles/aissar17.htm (visited January 24, 2014) 10

Ted Cross, *Putting God Back into Work: Calling, Vocation and Service to the Divine*, CANYON J. OF INTERDISCIPLINARY STUDIES, available at http://www.gcu.edu/Ken-Blanchard-College-of-Business/The-Canyon-Journal-of-Interdisciplinary-Studies/Putting-God-Back-into-Work-Calling-Vocation-and-Service-to-the-Divine.php (visited Jan. 24, 2014) 9, 10, 12, 15

INTEREST OF *AMICUS CURIAE* [1]

Amicus curiae Family Research Council is a non-profit organization located in Washington, D.C., that exists to develop and analyze governmental policies that affect the family. FRC is dedicated to the promotion of marriage and family and the sanctity of human life in national policy. FRC believes in protecting the rights of religious persons to adhere to and pursue their religious beliefs in all aspects of their lives, and regardless of the legal structures they use to organize their commercial activities.

SUMMARY OF ARGUMENT

Religious exercise is not confined to the home, to church, or to non-profit activities with expressly religious purposes. Rather, it can be present in all aspects of living one's life faithfully, including the commercial aspects of life. The decision of the businesses in this case to adhere to, and affirmatively advance, the religious principles of their owners and themselves in the operation of their businesses reflects long-held religious tenets regarding the interaction between faith and work.

While *Amicus* agrees with the Tenth Circuit that the exercise of religion can be burdened in the business environment no less than in other contexts, par-

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[1] No counsel for a party authored this brief in whole or in part, nor did any person or entity, other than *Amicus* or its counsel, make a monetary contribution intended to fund the preparation or submission of this brief. This brief is submitted pursuant to the accompanying consent letter of Respondents in Hobby Lobby and the blanket consent letters of the remaining parties, on file with this Court.

ticularly where the government seeks to coerce action directly contrary to a business's religious principles, this brief goes further. Underlying the government's distinction between for-profit entities and religious and non-profit entities is the notion that merely having a purpose to engage in profitable commercial activities necessarily divorces the participants from the exercise of their religion or negates any simultaneous purpose to exercise religion. That notion is incorrect.

Under a variety of religious doctrines, a person's participation in the economic activity of his or her community can involve just as full a part of exercising religion as solitary prayer, attending church, keeping the Sabbath, or seeking to bring one's faith to others. Two examples of this are the Christian concept of vocation and the Jewish Halacha, or collective body of religious law drawn from the Torah, the Talmud, and rabbinic law.

The idea of vocation concerns living a life of faith in the world by engaging in work that allows you to realize your God-given talents while at the same time improving the world, serving your community, and honoring God. Doing that which you are "called" to do in a faithful manner can be no less an expression of religion than overt prayer and for many is the more difficult, more persistent, and more complete means of exercising their religion.

The Jewish Halacha, or Jewish law, has much to say concerning how you should conduct yourself in business. Though it can go into great detail and specificity, in the end it starts from and can be summarized as an obligation to conduct your business dealings in "holy" manner, with honesty and integrity,

faithful to the Torah. Jews attentive to Halacha thus exercise their religion in and through their business as much as they do in other activities.

The suggestion that those who elect to honor God through vocation or faithful dealings in all aspects of life rather than through ordained ministry or exclusively charitable activities face less of a burden from identical government commands simply demeans those who would live their religion *in* all aspects of the world rather than only in some aspects of or apart from the world. Accordingly, for those who view their work as a vocation or as yet another arena in which they should act according to religious obligations, the government's distinction between commercial and other activities is meaningless and does not minimize or negate the *burden* on their religious exercise. Such religious exercise is equally possible in commercial enterprises that are not overtly religious as it is in overtly religious or charitable enterprises. Forcing businesses and their owners to violate their religious principles in connection with their work is as much of a burden as forcing them to take the same actions in any other context. While the *government*'s interests in imposing a requirement may sometimes be different as between the two contexts, the burden on the private parties exercising religion is not.

The government's attempted distinctions relating to the corporate form and separate corporate existence are equally unavailing. Although not *natural* persons, corporations nonetheless possess purpose, can have multiple purposes including some that involve religious exercise, and may have religious constraints upon their economic conduct. The very ex-

istence of incorporated churches and other non-profit corporations covered under the Religious Freedom Restoration Act, 42 U.S.C. 2000bb, *et seq.* ("RFRA"), demonstrates this truism.

Furthermore, a corporation's purposes and "beliefs" can be discerned from its founding documents and policies or actions adopted by its board of directors and officers acting within the scope of their authority. It is neither inappropriate veil-piercing nor even surprising that a corporation's religious views match those of its directors and the owners whose interests those directors serve, particularly in a closely-held corporation where those are the same people. The government's distinctions based on the corporate form thus are as inapplicable as its distinction based on profit-seeking.

Because two irrelevant distinctions do not combine to make a meaningful argument, this Court should hold that RFRA covers the business claimants in these cases and that the HHS mandate substantially burdens their exercise of religion.

ARGUMENT

RFRA provides, as a general rule, that the "Government shall not substantially burden a person's exercise of religion." 42 U.S.C. § 2000bb-1(a). *Amicus* will leave to others whether the HHS mandate requiring insurance coverage for certain contraceptives to which there is a sincere religious objection constitutes a substantial burden as applied to individuals, religious institutions, and non-profits, though it

agrees that the mandate *does* impose such a burden.[2] *Amicus* instead focuses on why imposing an otherwise burdensome requirement on a *for-profit* business does not eliminate the burden on religious exercise.

Amicus also will discuss why the corporate form of the claimants does not preclude them from exercising religion when acting in a manner intentionally consistent with religious tenets or acting to advance religious purposes. There can be no serious dispute that corporations can exercise religion given that incorporated churches, religious non-profit corporations, and at least some other non-profit corporations with religious objections are covered under RFRA as "persons" that engage in the "exercise of religion." The extended debate regarding corporate identity and the relationship between shareholders and the corporation is unwarranted given that such issues apply equally to non-profit corporations and many churches. The government's arguments regarding corporate form thus fail in light of RFRA's coverage of those entities.

In the end, the government's arguments in this case amount to an extended bait-and-switch. It concedes that restrictions or requirements on *commercial* activity can burden the religious exercise of persons engaged in for-profit commerce as individuals or un-

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[2] The challengers in these cases object to the HHS mandate insofar as it requires them to pay for and facilitate the use of contraceptives that can act to prevent implantation of an embryo, thus causing the termination of a human life according to their sincere and strongly held religious views concerning when human life begins. The government does not dispute the sincerity of those religious beliefs or the fact that the contraceptives at issue can have that consequence, even if that is not their exclusive means of operation. *See* Sebelius Pet. Br. 8, 9-10 n. 4.

incorporated business entities. Yet it argues that the for-profit nature of a corporation somehow distinguishes it from a non-profit corporation subject to identical restrictions and requirements that burden religious exercise. Similarly, it concedes that corporate "persons" – incorporated churches and other religiously minded non-profit corporations – engage in the exercise of religion and are protected under RFRA in their own right. Yet it argues that for-profit corporations are discrete legal entities that cannot themselves exercise religion. The government never explains why those two independent distinctions – profit-seeking and corporate form – each separately irrelevant, somehow combine to deny the corporate parties in this case coverage under RFRA. Rather, when one distinction is refuted it simply points to the other in a daisy-chain of avoidance.

I. Commercial Activity Does Not Preclude or Excuse Religious Observance and Often Can Be a Means of Exercising Religion.

Any attempt to distinguish for-profit and non-profit corporations for purposes of RFRA turns on the question whether a corporation that has as at least part of its purpose the making of profit is nonetheless incapable of also exercising religion. But just as individuals may pursue and advance their beliefs in many ways, including by the manner in which they conduct their business activities, corporations likewise may pursue more than one goal or interest simultaneously. Given that it is conceded that *some* corporations engage in religious exercise, Sebelius Pet. Br. 7, 13, 17, the fact that a for-profit corporation *also*

engages in commercial activities does not negate its ability to do likewise.

The government advances a false dichotomy between religious and business activities with its claim that requirements that would burden religious exercise by non-profit corporations somehow impose no such burden on for-profit corporations. It argues, for example, that "for-profit corporations conducting commercial enterprises are not persons exercising religion" under RFRA. Sebelius Pet. Br. 13; *see also id.* 16 (no Supreme Court case holding "that for-profit corporations exercise religion within the meaning of the Free Exercise Clause"). It then seeks to distinguish for-profit and non-profit corporations by arguing that for profit corporations " 'are different from religious non-profits in that they use labor to make a profit, *rather than* to perpetuate a religious values-based mission.' " Sebelius Pet. Br. 19 (citation omitted) (emphasis altered); *see also id.* (" '[U]nlike for-profit corporations, nonprofits historically have been organized specifically to provide certain community services, not *simply to engage in commerce*.' ") (citation omitted) (emphasis added).

As can be seen from the above quotes, the government's argument assumes that business corporations can have only *one* purpose – to make-profit – that is necessarily mutually exclusive with any purpose to "perpetuate a religious values-based mission." According to the government, therefore, while non-profit corporations can exercise religion by pursuing a religious mission, for-profit corporations are by definition incapable of likewise exercising religion based solely on the fact that they also pursue profits.

The government's position constitutes an incorrect understanding of religious exercise and in particular the interaction between work and faith. Commercial activities, whether merely conducted in a manner compatible with religious obligations and prohibitions, or conducted in a way that affirmatively advances religious faith, are no less occasions to exercise one's religion than prayer, charitable endeavors, or seeking to bring one's faith to others.

At the most basic level, government action compelling or coercing a business to affirmatively violate what it views as a religious obligation presents no less a burden on religious exercise for having been done in connection with business activities than if done in any other context. *Amicus* thus agrees with the holding of the Tenth Circuit that a requirement compelling persons to violate their religious beliefs burdens their exercise of religion regardless of its connection to for-profit activities. *See* Sebelius Pet. App. 39a (Tymkovich, J.) ("sincerely religious persons could find a connection between the exercise of religion and the pursuit of profit. Would an incorporated kosher butcher really have no claim to challenge a regulation mandating non-kosher butchering practices? * * * A religious individual may enter the for-profit realm intending to demonstrate to the marketplace that a corporation can succeed financially while adhering to religious values. As a court, we do not see how we can distinguish this form of evangelism from any other."); *see also id.* at 36a (citing Free Exercise claims in *United States* v. *Lee*, 455 U.S. 252 (1982) (Amish employer), and *Braunfeld* v. *Brown*, 366 U.S. 599 (1961) (plurality opinion) (Jewish merchants)).

Beyond that agreement, however, *Amicus* would make the broader point that religious exercise does not necessarily confine itself to discrete locations, activities, or aspects of participation in the life of a community, but can permeate a person's daily behavior, from the mundane to the commercial, as well as his or her expressly religious endeavors.

Two particularly direct examples of religious exercise suffusing commercial activity are the Christian concept of "vocation" and parts of the body of Jewish law known as Halacha.

The concept of "vocation," generally associated with certain Christian teachings, involves viewing the " 'act of making a contribution through our work * * * an act of devotion to the divine.' " Ted Cross, *Putting God Back into Work: Calling, Vocation and Service to the Divine*, CANYON J. OF INTERDISCIPLINARY STUDIES, available at http://www.gcu.edu/Ken-Blanchard-College-of-Business/The-Canyon-Journal-of-Interdisciplinary-Studies/Putting-God-Back-into-Work-Calling-Vocation-and-Service-to-the-Divine.php (visited Jan. 24, 2014) (quoting J. Neal, *Work as Service To the Divine: Giving Our Gifts Selflessly and with Joy*, 43 THE AM. BEHAVIORAL SCIENTIST 1316, 1319 (2000)). For persons of faith, work can not only be "meaningful and viewed as making a difference in the world at large, it also may become an expression of spirituality" and "a way to serve others and through that service serve God." *Id.*

Some religious views, particularly those associated with Martin Luther, see a potentially broader and deeper connection between work and religious exercise. Through the "faithful execution of one's duties"

in "any station that one might occupy in the world of productive work * * *, one both pleased God and contributed to the general welfare of humankind. So by working diligently to make shoes that will cover and warm human feet, the cobbler serves God in his or her station with just as much divine approbation as the person whose station it is to preach the word of God." *Id.*

As one observer has characterized it, "on one level, faithfulness in Christian vocation involves being about the ordinary living out of our commitments and projects that arise from our membership and specific stations in our families, workplace and general society." Stephen A. Hein, *Luther on* Vocatio*: Ordinary Life for Ordinary Saints*, Issues, Etc., available at http://www.mtio.com/articles/aissar17.htm (visited January 24, 2014). To Luther, the call to live a life of faith "always touches us within our space – where we live already," and godliness "is the obedience of extraordinary faith expressed in the ordinary life." *Id.*

Catholic teaching also sees no religious separation between private and commercial activities. The vocation of the laity consists of three things: "to sanctify work, to sanctify themselves in work, and to sanctify others through work," according to Saint Josemaria Escriva, founder of the Prelature of the Holy Cross and *Opus Dei*. CONVERSATIONS WITH JOSEMAIRA ESCRIVA, Section 10 (Scepter Publishers 2003). He explained that " 'a Christian should do all honest human work, be it intellectual or manual, with the greatest perfection possible: with human perfection (professional competence) and with Christian perfection (for love of God's Will and as a service to man-

kind). Human work done in this manner, no matter how humble or insignificant it may seem, helps to shape the world in a Christian way." *Id.* After giving the example of "Christ, who spent most of His life on earth working as a craftsman in a village," he noted that work not only advances human values and social progress, but reflects men's "love for God" and is a "way to sanctify." *Id.*; *see also* Josemaria Escriva, FURROW, section 517, (Scepter Publishers 1988) ("Sanctifying one's work is no fantastic dream, but the mission of every Christian"); CATECHISM OF THE CATHOLIC CHURCH, *Economic Activity and Social Justice*, ¶ 2427, available at http://www.vatican.va/archive/ENG0015/__P8D.HTM (visited Jan. 26, 2014). ("Work can be a means of sanctification and a way of animating earthly realities with the Spirit of Christ.").

In addition to work itself having religious significance, the Catholic Church teaches that work must be performed in a manner consistent with belief, explaining that "Economic activity, conducted according to its own proper methods, is to be exercised within the limits of the moral order, in keeping with social justice so as to correspond to God's plan for man." *Id.* ¶ 2426. As Cardinal Peter K. A. Turkson, head of the Pontifical Council for Justice and Peace, explained, "the vocation of the Christian business leader [is] to practice love and justice and to teach the business household for which he or she is responsible to do likewise." Catholic News Agency, *Live your faith in the marketplace, cardinal tells business leaders* (Apr. 9, 2012), available at http://www.catholicnewsagency.com/news/live-your-

faith-in-the-marketplace-cardinal-tells-business-leaders/ (visited Jan. 26, 2014). Discussing the Pontifical Council's document entitled "Vocation of the Business Leader: A Reflection," the Cardinal explained that the "separation of faith from professional life 'is a fundamental error which contributes to much of the damage done by businesses in our world today' – including the neglect of family life, an 'unhealthy attachment to power,' and the 'abuse of economic power' that disregards the common good." *Id.* He directed business leaders to "focus on doing God's will in the private sector * * * [and to] organiz[e] work 'in a manner that is respectful of human dignity.' " *Id.*

The concept of vocation thus combines "the spiritual with the secular," consists of finding " 'that place in the world of productive work that one was created, designed, or destined to fill by virtue of God-given gifts and talents and the opportunities presented by one's station in life' " and involves "occupations that contribute toward the greater good and God's glory." Cross, *Putting God Back into Work, supra* (quoting J. Stuart Bunderson & Jeffrey A. Thompson, *The Call of the Wild: Zookeepers, Callings, and the Double-edged Sword of Deeply Meaningful Work*, 54 ADMINISTRATIVE SCI. QUARTERLY, 32, 33 (March 2009), and citing Daniel T. Rodgers, THE WORK ETHIC IN INDUSTRIAL AMERICA, 1850-1920 (University of Chicago Press 1978)).

While not all religions necessarily view any and all work as itself being a form of or occasion for affirmative religious exercise, the larger point for purposes of this case is that there is no conceptual line separating commercial activity from religious exercise. And that

observation takes on special relevance where the businesses in question overtly adhere to a principle of religious service and a commitment to act according to religious tenets, as is true in this case.

Another example of how work and religious exercise can be intertwined is the Jewish Halacha. Halacha is the collection of Jewish law contained in or evolved from the Torah, the Talmud, and subsequent rabbinic law. Halacha covers all aspects of life and in particular has much to say regarding business and economic conduct. *See* Rabbi David Golinkin, *The Basic Principles of Jewish Business Ethics*, Vol. 3, No. 1 (October 2003), available at http://www.schechter.edu/insightIsrael.aspx?ID=59 (visited Jan. 26, 2014) ("Contrary to what many think, Jewish law and ethics have much to say about the world of business: accurate weights and measures, overcharging, verbal deception, false packaging and much more."); Business Halacha, *Hilchos Chosen Mispat Vol. III, No. 19: Fair Profits and Measures*, available at http://www.torah.org/advanced/business-halacha/5757/vol3no18.html (visited Jan. 26, 2014) (giving examples of how halachic rules often exceed secular legal rules on profit, weights and measures, and economic remedies).

While Halacha contains much detailed guidance on a wide range of business behavior, in the end the essence of that guidance is the obligation to conduct one's business honestly and honorably, in accordance with the religious tenets of the Torah as interpreted over the centuries. Halacha commentators point to observations by the Sages that when you die and are

brought for final judgment God asks "were you faithful in your business dealings." Golinkin, *Jewish Business Ethics*, *supra*; *see also* Rabbi Yitzchok Breitowitz, *Jewish Business Ethics: An Introductory Perpective* (Part I), available at http://www.jlaw.com/Articles/JewBusEthI.html (visited Jan. 26, 2014) (In the Talmud's discussion of "what types of questions people are asked by God after their deaths," the "very first question that we are held accountable for * * * is 'Nasata V'netata Be'emunah' which means 'did you conduct your business affairs with honesty and with probity?' ").

Following Halacha and hence the Torah in commercial aspects of life is considered no different than following the Torah and derived rules in any other area of life. As Rabbi Breitowitz has remarked, it is in how we respond to the confrontation between the "ethereal transcendent teachings of holiness and spirituality" and the "often grubby business of making money" that is the "acid test of whether religion is truly relevant" and where we can show that "God coexists in the world rather than God and godliness being separate and apart." *Jewish Business Ethics*, *supra*. Thus, similar to some of the principles of vocation, the command in the Jewish prayer the Shema that "'You shall love the Lord your God with all of your heart, with all of your soul, and with all of your might,' has been interpreted as including serving God with all of your possessions and that "in the conduct of our business in the accumulation of wealth, there is also a mechanism to serve God." *Id.*

The example of Halacha, like vocation, serves to illustrate the point that for many people of faith, there

is no line separating the exercise of religion in private or non-profit activities from its exercise in commercial activities. Such persons exercise their religious principles throughout the whole of their lives and any commands to abjure their religious principles impose identical burdens regardless whether they are conducting commerce, tending to the needy, visiting a place of worship, or raising a family.

While some may hold the view that "spirituality and business [are] exact opposites," one concerned with "questions of meaning and ultimate significance" and the other "devoted to making money and to affairs of this world," Cross, *Putting God Back into Work*, *supra*, that is not the view taken by many people of faith across a range of religious traditions. Where to draw any line regarding if and where religious exercise ends and secular behavior begins is itself a question of religion not appropriately answered by the government. Secular law may indeed take precedence over religious exercise in various cases – ancient traditions of human sacrifice will not be accommodated, no matter how sincere the belief – but the line is drawn not by denying the scope of religious belief and exercise, but by demonstrating, if and where true, that the government's compelling interests outweigh the burden imposed on religious exercise.

Returning to the context of these cases, therefore, if the substantial burden imposed by the HHS mandate is to be denied, it cannot be on the ground that while it imposes a burden on religious and non-profit entities, it imposes no such burden on commercial entities. Any line between supposedly secular commer-

cial activity and religious non-commercial activity is ephemeral at best, and smacks of the government imposing its own religious views on those who see no necessary separation between the two.

Furthermore, while not every religion may share the same views regarding vocation or religiously derived business ethics, certainly all would agree that the mere fact one is engaged in work for profit does not excuse a person from abiding by religious obligations. A Jew who believed in an obligation to be Kosher and so acted at home would not automatically be excused from that obligation merely because he was at work. The universal religious prohibition against murder (however defined) is not excused merely because done for hire or in the context of some other business activity. Thus, for example requiring a doctor (who charged for her services and thereby was engaged in a for-profit activity) to perform abortions if that violated her religious beliefs concerning when life begins would certainly "substantially burden" her exercise of religion even if the requirement were expressed only as a condition on engaging in the for-profit practice of medicine.[3]

Similarly, there seems little question that a for-profit business engaging in direct religious expression is exercising religion no less than a non-profit entity doing the same. Surely a law that forbade all com-

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[3] Note that this point does not turn on whether the government might ever have a sufficiently compelling interest to justify such a burden (though that seems unlikely). It only observes that such a requirement or condition in fact constitutes a burden on the exercise of religion regardless of the for-profit nature of the doctor's practice.

mercial businesses from engaging in religious expression (or from selling religious texts) would "substantially burden" the exercise of religion.

That commercial endeavors have as a purpose and consequence earning money to support one's own material needs and activities, providing for one's family, and providing jobs to others, no more precludes them from also involving religious exercise than do any intertwined benefits a person receives from other forms of indisputably religious activities. For example, various religions encourage or require their adherents to go on a mission to spread the word of their faith to others. That a person chooses to perform her mission in a foreign country because she likes to travel and visit new places, and thus derives personal as well as religious benefits from the mission, does not convert such a mission into a secular activity. Similarly, any personal benefits one might receive from attending church – standing in the community, business opportunities, an increased likelihood of being elected to public office by a constituency that values faith, for example – likewise does not convert church attendance into a secular activity.

In the end, the government's attempted distinction between for-profit businesses and non-profit or overtly religious entities cannot be squared with Christian traditions of faith through vocation and the Jewish beliefs in righteousness through obedience to Halacha in business dealings as in other areas of life. Because business practices are not separate or excused from religious doctrines regarding faithful or righteous conduct, the challengers in this case are exercising religion by insisting that their provision of health in-

surance as part of their business practices must also be consistent with their religious tenets. Requiring them to provide insurance to pay for activities incompatible with those religious tenets constitutes a burden on their exercise of religion. Accordingly, this Court should reject the government's claim that the tax code's mere for-profit categorization of an entity precludes it from exercising religion, having that exercise burdened, or being covered by RFRA.

II. The Corporate Parties in this Case Themselves Exercised Religion and thus Are Entitled To Invoke RFRA.

In the second component of the government's bait-and-switch, it argues that because corporations are distinct legal entities from their owners, they do not exercise religion on their own behalf and that the claim for relief in this case improperly "attributes the religious beliefs of the corporate shareholders to the corporate respondents themselves." Sebelius Pet. Br. 13; *id.* 22, 25 (nothing in RFRA or the Dictionary Act suggests that "for-profit corporations are 'person[s]' that themselves engage in the 'exercise of religion' in the sense Congress intended"; a "corporation is legally distinct from its owners" and there is "no basis on which to impute the individual respondents' religious beliefs to the corporate respondents").

That argument misconceives the nature of corporate governance and conduct, misconceives what constitutes religious exercise, and is incompatible with RFRA's recognition and the government's concession that incorporated churches and other non-profit corporations can and do "exercise religion" themselves

and may bring a claim for burdens on such exercise in their own right.

First, the concession that incorporated churches and non-profits can sue as "persons" under RFRA and hence exercise religion in their own right fully rebuts any relevance of corporate structure to religious exercise. Merely noting that such corporations have a primary or even exclusive purpose of advancing religion or doing religiously motivated charitable work says nothing about the corporate *form*, and in fact illustrates that the constructed "personhood" of such entities is not a barrier to religious exercise. A corporation's existence as a person distinct from its owners thus does not imply that the corporation cannot have its own religious purposes or engage in religious exercise, it just requires an inquiry into whether it does *indeed* have such purposes and engage in such conduct, not that they are the *exclusive* purposes and conduct of the corporation. Whatever relevance such the latter inquiry may have for the tax code, it has nothing to do with whether a corporation exercises religion, no more than it controls whether a natural person, an unincorporated business, or a mixed-purpose non-profit exercises religion.

The government's suggestion that "when corporations enter the commercial world for profit, they necessarily " 'submit themselves to legislation * * * designed to protect the health, safety, and welfare of employees,' " Sebelius Pet. Br. 19 (citation omitted), is a complete non-sequitur. Non-profit corporations are likewise subject to much of the same legislation to protect *their* employees, as are individual for-profit employers operating in non-corporate form. Yet the

government acknowledges that both such categories of employers may raise RFRA claims. Indeed, RFRA exists precisely to require some religious exemptions from "legislation" to which claimants have otherwise "submit[ted]" themselves by their activities as employers, businesses, or merely as citizens.

Second, the government's argument that the values and the beliefs of corporate owners cannot be attributed to the corporation also misconceives the nature of corporations, how they act, and what they "think" or "believe." That a corporate "person" can act, can have intent, can have principles, and can follow or violate those principles is a basic truism reflected in corporate law and in civil and criminal laws applicable to corporations.

A corporation obviously can engage in myriad forms of conduct through its directors, officers, employees and agents. It can likewise have "purposes." *See, e.g.*, DEL. GEN. CORP. L. § 101(b) ("a corporation may be incorporated or organized under this chapter to conduct or promote any lawful business or purposes"). While the government claims to find *different* purposes between non-profit and for-profit corporations, it necessarily concedes that corporations *have* such purposes. A corporation can also have beliefs, or at least a state of "mind." Numerous civil and criminal laws applicable to corporations ask whether a corporation acted with "knowledge," scienter, or culpable intent. Civil and criminal sanctions for a corporation may turn on whether the corporation "knew" of a particular fact or whether it acted with discriminatory or other prohibited intent. *See, e.g.*, 42 U.S.C. § 2000e(a) & (b) (defining "person" under Title VII to

include "corporations" and "employer" as a "person" meeting various conditions); *id.* § 2000e-5(g)(1) (providing for injunction where "respondent has *intentionally* engaged in or is *intentionally* engaging in an unlawful employment practice") (emphasis added).

The more meaningful question is where to look to determine a corporation's purposes and what it thinks or believes. Again the answer turns out to be fairly straightforward: One looks to corporate documents and to the corporation's directors and officers acting within the scope of their authority. Corporate documents such as articles of incorporation and bylaws typically identify a range of corporate purposes and at least *authorize* other corporate purposes not inconsistent with the ones expressly identified. *See, e.g.*, DEL. GEN. CORP. L. § 102 (requirement that articles of incorporation state corporate purposes satisfied if the articles state, "either alone or with other business purposes, that the purpose of the corporation is to engage in any lawful act or activity for which corporations may be organized). Within the range of those identified or allowed purposes, statements of corporate policy can identify more specific purposes, including social, charitable, and religious purposes.

As for how to identify what a corporation knows or "believes," cases involving potentially culpable conduct have repeatedly answered that question – a corporation believes what its directors and officers, acting within the scope of their authority, know and believe (either directly or through imputation). Where corporate "belief" concerns broader issues relating to the overall purposes and direction of the corporation,

however, the board of directors generally acts as the corporate "mind" and determines (potentially subject to a shareholder vote, on the issue or eventually on the directors themselves) what a corporation officially believes. DEL. GEN. CORP. L. § 141(a) ("The business and affairs of every corporation organized under this chapter shall be managed by or under the direction of a board of directors"). When the directors express themselves as a body, for example by adopting a statement of purpose, the corporation's belief is articulated directly. But the fact that the directors have not articulated the corporate view on every conceivable question does not mean that the corporation does not *have* such views. To find out what the corporation's views are, all one has to do is ask.

In this case, fortunately, one need not ask very much. Hobby Lobby has adopted a policy statement of expressly religious purpose. It has also, as a corporation, elected to challenge the HHS mandate and asserted that parts of the mandate violate its religious principles. Given that there is no suggestion that the directors and officers acted outside the scope of their authority, contrary to the corporation's purposes, contrary to the interests of the shareholders, or in any other improper manner, such official corporate action is itself sufficient to identify what the corporation believes. The corporation believes what its directors, acting within the scope of their authority, say it believes.

Thus, while the corporation indeed shares the religious beliefs of its owners, it does so not simply by virtue of their ownership *per se*, but because they are also the organizers, directors, and officers of the cor-

poration. Sebelius Pet. App. 8a (Tymkovich, J.). Those individuals, when acting collectively, in their official capacities, *are* the corporation for current purposes, or at least the corporation's "mind" and arguably its soul. Attribution of their beliefs to the corporation is not some improper veil-piercing but rather fully consistent with the nature and structure of the corporation.

Because the government concedes that at least some corporations exercise religion, because even for-profit corporations can have religious purposes, and because the directors of a corporation effectively constitute the "mind" of the corporation and can, within the scope of their authority, direct it to act based on religious beliefs, the government's arguments based on the corporate form fail.

Neither the profit-seeking nor the corporate-form arguments advanced by the government are relevant to RFRA coverage in this case. Their combined irrelevance does not change the result.

CONCLUSION

For the foregoing reasons, this Court should rule in favor of Hobby Lobby and Conestoga and against the government.

Respectfully submitted,

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